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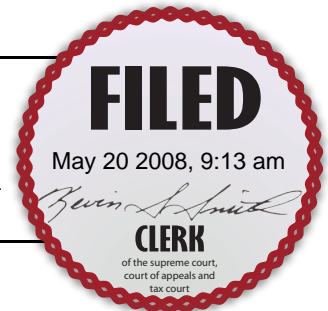
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**IN THE
COURT OF APPEALS OF INDIANA**



In the Matter of the Involuntary Termination)
of the Parent-Child Relationship of B.S., Minor)
Child and his Mother, Deborah S.,)

DEBORAH S.,)

Appellant-Respondent,)

vs.)

No. 49A04-0711-JV-615

MARION COUNTY DEPARTMENT OF)
CHILD SERVICES,)

Appellee-Petitioner,)

CHILD ADVOCATES, INC.,)

Co-Appellee-Guardian Ad Litem.)

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Marilyn Moores, Judge
The Honorable Danielle Gaughan, Magistrate
Cause No. 49D09-0705-JT-21149

May 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Deborah S. (“Mother”) appeals the involuntary termination of her parental rights, in Marion Superior Court, to her son, B.S. Mother raises one issue on appeal, which we restate as whether the juvenile court’s judgment terminating Mother’s parental rights to B.S. is supported by clear and convincing evidence.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the judgment reveal that Mother is the biological mother of B.S., born on May 18, 2006.¹ When B.S. was approximately three weeks old, Mother left him in the care of her boyfriend, stating she would return for B.S. in a few hours. However, while gone, Mother, a cocaine addict, suffered a relapse and did not return for three days.

Meanwhile, Mother’s boyfriend called the Marion County Department of Child Services (“MCDCS”) because he was unwilling or unable to continue to care for B.S. The MCDCS took B.S. into temporary protective custody. On June 7, 2006, the MCDCS filed a petition alleging B.S. was a child in need of services (“CHINS”). The CHINS petition stated:

On or about June 6, 2006, the [MCDCS] determined by its Family [Case Manager] . . . the child to be a [CHINS] because there is no one with legal responsibility of the child available to provide for his care. The Mother . . . has abandoned her child with an individual who . . . is no longer able or willing to care for the child.

¹ B.S.’s father is unknown and is not a party to this appeal.

Ex., Vol. 1, Pet. Ex. 4 at 5. On September 22, 2006, the juvenile court found B.S. to be a CHINS. The juvenile court proceeded to disposition, ordered B.S. removed from Mother and made a ward of the MCDCS, and further ordered “no services offered or ordered until [Mother] appears in Court and in the Office of Family and Children, to demonstrate a desire and ability to care for the child.” Ex., Vol. 1, Pet. Ex. 5 at 9.

On May 22, 2007, the MCDCS filed a petition to terminate Mother’s parental rights to B.S. At an initial hearing on the termination petition held on June 12, 2007, Mother was appointed counsel. A fact-finding hearing on the termination petition was held on September 10, 2007. Mother was represented by counsel and attended the hearing telephonically. At the conclusion of the hearing, the juvenile court took the matter under advisement, and on September 13, 2007, issued its judgment terminating Mother’s parental rights to B.S. This appeal ensued.

DISCUSSION AND DECISION

Mother alleges the MCDCS failed to prove by clear and convincing evidence each element set forth in IC 31-35-2-4(b)(2) as is required for the involuntary termination of parental rights.

This Court has long had a highly deferential standard of review in cases concerning the termination of parental rights. *In re K.S.*, 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). Thus, when reviewing the termination of parental rights, we will not reweigh the evidence or judge the credibility of the witnesses. *In re D.D.*, 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), *trans. denied*. Instead, we consider only the evidence and reasonable inferences that are most favorable to the judgment. *Id.*

Here, the juvenile court made specific findings in terminating Mother's parental rights. Where the juvenile court enters specific findings of fact and conclusion thereon, we apply a two-tiered standard of review. First, we must determine whether the evidence supports the findings. *Bester v. Lake County Office of Family & Children*, 839 N.E.2d 143, 147 (Ind. 2005). Secondly, we determine whether the findings support the judgment. *Id.* In deference to the juvenile court's unique position to assess the evidence, we will set aside the court's judgment terminating a parent-child relationship only if it is clearly erroneous. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied*. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. *D.D.*, 804 N.E.2d at 264. A judgment is clearly erroneous only if the findings do not support the court's conclusions or the conclusions do not support the judgment thereon. *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996).

"The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." *In re M.B.*, 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), *trans. denied*. However, the juvenile court must subordinate the interests of the parents to those of the child when evaluating the circumstances surrounding the termination. *K.S.*, 750 N.E.2d at 837. Parental rights may be terminated when the parents are unable or unwilling to meet their parental responsibilities. *Id.* at 836.

In order to terminate a parent-child relationship, the State is required to allege that:

- (A) one (1) of the following exists:
 - (i) the child has been removed from the parent for at least six (6) months under a dispositional decree;

* * *

- (B) there is a reasonable probability that:
 - (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or
 - (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
- (C) termination is in the best interests of the child; and
- (D) there is a satisfactory plan for the care and treatment of the child.

IC 31-35-2-4(b)(2). The State must establish each of these allegations by clear and convincing evidence. *Egley v. Blackford County Dep't of Pub. Welfare*, 592 N.E.2d 1232, 1234 (Ind. 1992). Mother's sole allegation on appeal is that the MCDCS failed to prove by clear and convincing evidence that there is a reasonable probability the conditions resulting in B.S.'s removal from her care will not be remedied, and that continuation of the parent-child relationship poses a threat to B.S.'s well being. Specifically, Mother claims that she has made "great strides toward the goal of overcoming her addiction" while incarcerated and thus "the reason for removal and placement outside the home has been remedied." *Appellant's Br.* at 8. Mother further asserts there was "no evidence presented to indicate her relationship with her son posed any type of a threat to the child." *Id.* at 3.

Initially, we observe that IC 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, only one of the two requirements of subsection (B) must be found by clear and convincing evidence. *In re L.S.*, 717 N.E.2d 204, 209 (Ind. Ct. App. 1999), *trans. denied*. We will first review whether the trial court's finding that there is a reasonable probability

the conditions resulting in B.S.'s removal from Mother's care will not be remedied is supported by clear and convincing evidence.

When determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the juvenile court must judge a parent's fitness to care for his or her child at the time of the termination hearing, taking into consideration evidence of changed conditions. *In re J.T.*, 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), *trans. denied*. The court must also evaluate the parent's habitual patterns of conduct to determine whether there is a substantial probability of future neglect or deprivation of the child. *In re M.M.*, 733 N.E.2d 6, 13 (Ind. Ct. App. 2000). The MCDCS is not required to rule out all possibilities of change; rather, it need establish "only that there is a reasonable probability that the parent's behavior will not change." *In re Kay. L.*, 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In determining that there is a reasonable probability Mother's behavior will not change, and thus the conditions resulting in B.S.'s removal will not be remedied, the juvenile court made the following pertinent findings:

5. [Mother] has a fifteen year old daughter that lives with her biological father. She has three sons, not including [B.S.], ages 6, 5, and 3, that were previously the subjects of a CHINS action. [Mother] signed consents, and those three children were adopted by a maternal aunt. The basis of that CHINS action was that the youngest of the three sons was born cocaine positive and [Mother's] continued drug use prevented her from being able to adequately care for her children.
6. [Mother] was in jail for several months before [B.S.'s] birth. She was released from jail [four] days before [B.S.] was born.

7. When [B.S.] was approximately three weeks old, [Mother] left him with her then boyfriend. She told her boyfriend she would be back in three hours but did not return for at least three days. Her boyfriend contacted [MCDCS] because he was no longer willing or able to take care of [B.S.].
8. [Mother] spoke with the case manager after she returned and admitting [sic] to relapsing.
9. [Mother] appeared in court on the CHINS matter and visitation with [B.S.] was scheduled. She attended no more than two visits at the end of June 2006, and then she no longer showed up for visits or for court. Because she never appeared again in court, no other services were ordered.
10. In October of 2006, [Mother] was arrested on the case for which she is presently serving time. She has remained in custody since that arrest.
11. Just recently, [Mother] has begun to write letters to her case manager but previously there had been no contact.
12. [Mother] has a criminal history reflecting a Possession of Paraphernalia conviction in 2000 as a Class A misdemeanor, and another Possession of Paraphernalia conviction in 2002 as a Class D felony. In 2005 and 2006 she has convictions for Possession of Cocaine, both [C]lass D felony convictions. Most recently, in January of 2007, she was convicted of Possession of Cocaine as a Class B felony, and she is presently incarcerated serving a sentence on that case.
13. [Mother's] outdate on her most recent conviction is in 2009.

* * *

15. [Mother] is presently receiving treatment during her incarceration. She is hopeful that she can complete the program she is involved in and then have her remaining time be served at Craine House. Craine house has approved her for their work release program but a sentence modification of her current sentence would be necessary.
16. Craine House does allow some participants to have their children with them at the facility but, because [Mother] is not currently caring

for her child, she was not accepted into that part of the program. [Mother] is hopeful that if she gets a sentence modification, she will be at Craine house and that after she is there a while, she might be able to have [B.S.] with her.

17. [Mother's] plan to reunify with [B.S.] is simply inadequate and based only on possibilities and good intentions. Right now her outdate from prison *is* in 2009 and her sentence has *not* been modified. Her participation with Craine House is *contingent* on her sentence being modified. Though she has been accepted by Craine House, she has *not* been accepted into the part of the program that allows for children to be on site because she is not [B.S.'s] caregiver. Her plan to have [B.S.] with her is *contingent* on Craine house transitioning her into that part of the program.
18. [Mother's] criminal history as well as her history with [MCDCS] reflects a pattern of drug abuse and incarcerations related to drug abuse. She has always sought treatment while incarcerated and has made progress with her present treatment which she feels has been more effective than ever before. Though commendable, [Mother's] recent progress in treatment is overshadowed by her past relapses, her long[-]term drug problem, her abandonment of [B.S.] (first with a boyfriend and then again by failing to show up for visitation after no more than two visits) and her prior drug related criminal convictions.

Appellant's App. at 7-9. The juvenile court then concluded, "There is a reasonable probability that the reasons for the placement of the child outside of the home of the parent will not be remedied." *Id.* at 10. Our review of the record reveals that there is clear and convincing evidence supporting the trial court's findings set forth above. These findings, in turn, support the trial court's ultimate decision to terminate Mother's parental rights to B.S.

Mother has a significant criminal history involving drug abuse and recurrent periods of incarceration due to drug-related convictions. Before B.S. was born, his three older brothers were found to be CHINS when the youngest of the brothers was born

cocaine positive. Mother was later incarcerated on a drug-related offense when pregnant with B.S. and was released only four days prior to his birth. B.S.'s emergency removal from Mother's care occurred when B.S. was three weeks old. Thereafter, Mother participated in only two visitations with B.S. before she ceased communications with the MCDCS. In October 2006, four months after B.S.'s removal, Mother was again arrested, both for violation of her probation, as well as for a new charge of Possession of Cocaine, a Class B felony. Mother was eventually convicted on the new charge; and, at the time of the termination hearing, Mother remained incarcerated with a projected release date not until September 2009. Thus, the "condition" resulting in B.S.'s removal from Mother's care, namely, Mother's unavailability, due to her drug abuse, abandonment of B.S., and recurrent periods of incarceration, still had not been remedied.

As stated previously, in determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the juvenile court must judge a parent's fitness to care for her child *at the time of the termination hearing*. *D.D.*, 804 N.E.2d at 266 (emphasis added). At the time of the termination hearing, Mother was incarcerated and unavailable to parent B.S. While we acknowledge and commend Mother's efforts to improve herself while incarcerated, her ability to remain sober and properly parent B.S. once released back into the "real world" remains unknown. Moreover, the juvenile court was permitted to judge Mother's credibility and weigh the evidence of changed conditions against the testimony demonstrating Mother's habitual patterns of conduct. On appeal, we cannot reweigh the evidence or judge the credibility of witnesses. *See In re L.V.N.*, 799 N.E.2d 63, 68-71

(Ind. Ct. App. 2003) (holding that mother's arguments that conditions had changed and she was now drug free constituted impermissible invitation to reweigh evidence).

Based on the foregoing, we cannot say that the juvenile court committed clear error when it found Mother's recent success in treatment while incarcerated to be "overshadowed by her past relapses, her long term drug problem, her abandonment of [B.S.] (first with a boyfriend and then again by failing to show up for visitation after no more than two visits) and her prior drug related criminal convictions." *Appellant's App.* at 9.² See *Bergman v. Knox County Office of Family & Children*, 750 N.E.2d 809, 812 (Ind. Ct. App. 2001) (concluding that trial court did not commit reversible error when it gave more weight to abundant evidence of mother's pattern of conduct in neglecting her children during several years prior to termination hearing than to mother's evidence that she had changed her life to better accommodate children's needs); see also *Castro v. State Office of Family & Children*, 842 N.E.2d 367, 374 (Ind. Ct. App. 2006) (concluding that trial court did not commit clear error in determining that conditions leading to child's removal from father would not be remedied where father, who had been incarcerated throughout CHINS and termination proceedings, was not expected to be released for several years after termination hearing), *trans. denied*. Accordingly, we find no error.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.

² Having concluded the juvenile court's finding regarding the remedy of conditions is supported by clear and convincing evidence, we need not consider whether the MCDCS proved by clear and convincing evidence that continuation of the parent-child relationship poses a threat to B.S.'s well being. *L.S.*, 717 N.E.2d at 209.

